The Advocate

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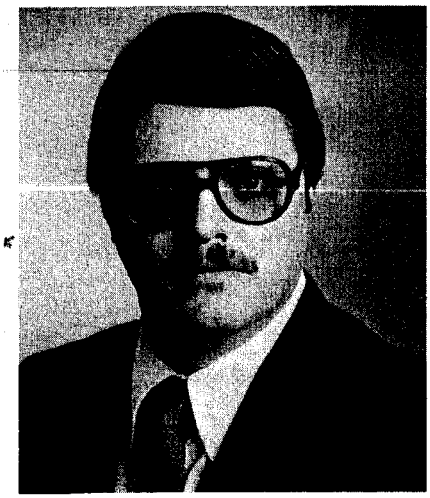

WILLIAM C. AYER, JR.

William C. Ayer, Jr., Deputy Public Advocate, has resigned from the Department of Public Advocacy (DPA) to go into private practice of law in Frankfort on January 1, 1983.

Ayer had served with the DPA for more than ten years and was the first attorney hired to work for the Department when it was founded as the Office of Public Defender in 1972.

"We'll miss him badly--Bill has served many clients faithfully and well and combined an extraordinary administrative skill with unusual sensitivity to clients' needs," said Jack Farley, Public Advocate. "I have lost my strong right arm," concluded Farley.

(See Ayer, P. 2)

11th ANNUAL DEPARTMENT OF PUBLIC ADVOCACY TRAINING SEMINAR

MAY SEMINAR

This year's May Seminar will be held May 15, 16, and 17 at the Drawbridge Motor Inn in Northern Kentucky.

We will again have a review of United States Supreme Court criminal cases, criminal ethics and a wide variety of elective sessions. National speakers will lecture on topics in the criminal law area. We will continue with a new feature added last year of running video tapes of selected criminal law topics during the registration period on Sunday afternoon.

(See Seminar, P. 2)

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This year's new aspect at the seminar will be the "on-the-feet" development of the trial skill of cross-examination. After a lecture on cross-examination there will be the opportunity for a limited number of participants to break-up into small groups, and to actually do cross-examination of a witness and be critiqued by two faculty members.

Mark off the dates on your calendar now for this year's May Seminar. See you there!

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SEMINAR UPDATE

Chief Justice Stephens has agreed that AOC (Administrative Office of the Courts) should send letters to all district and circuit judges encouraging them to arrange their dockets to allow public defenders and members of the criminal defense bar to attend the Eleventh Annual Department of Public Advocacy Training Seminar. Since the Judicial Conference which had been scheduled for May 16 and 17, 1983 has been cancelled by AOC due to financial problems, it is obvious that the courts in the Commonwealth will be open on Monday and Tuesday, May 16 and 17, 1983. Without the support of the Chief Justice and the AOC, it is entirely possible that district and circuit judges will attempt to force public defenders to be in court on the days of the office's annual seminar.

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(Ayer, Continued from P. 1)

Ayer is a graduate of Murray State University and took his law degree at the University of Kentucky in 1968. Prior to joining the Department of Public Advocacy, Ayer served two years as a Captain in the United States Army, and previously practiced law and also served as the Assistant Director of the Kentucky Bar Association.

When asked about his immediate plans Ayer indicated he would be serving as local public advocate in Scott County and developing his private criminal practice. Ayer said he also had a new appreciation for the difficulties a local lawyer faces in providing local public advocacy services.

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KENTUCKY CIVIL LIBERTIES UNION

Kentucky Civil Liberties Union is interested in bringing pro bono constitutional lawsuits. KCLU would like to expand its dockets in areas such as the First Amendment (church-state, as well as censorship), equal protection, due process, involuntary mental commitment, disability rights and race and sex desegregation. If you have a constitutional problem and need the assistance of an attorney, write to: Kentucky Civil Liberties Union, 809 South Fourth St., Louisville, Kentucky 40203, or call (502) 581-1181.

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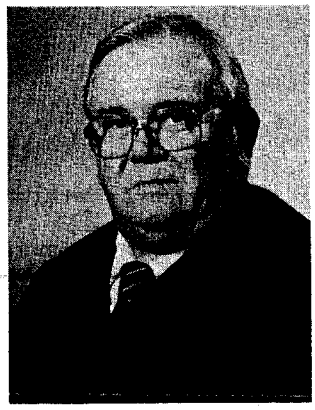
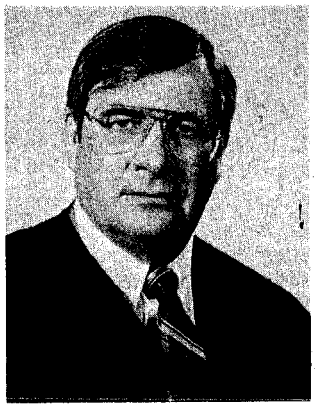
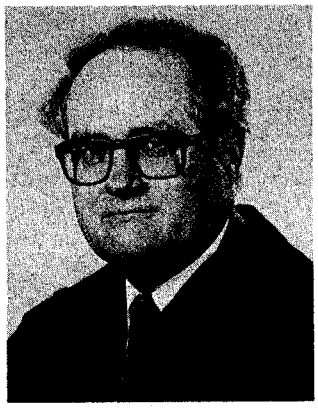
WILLIAM R. DUNN, JOHN D. MILLER, BILLY RAY PAXTON APPOINTED TO THE COURT OF APPEALS



DUNN



PAXTON



MILLER

JUDGE WILLIAM R. DUNN

Judge William R. Dunn, filling the vacancy created by the November election of Donald C. Wintersheimer to the Supreme Court, is representing the Sixth Appellate District. A circuit judge for the 16th Judicial Circuit (Kenton County) since 1965, Judge Dunn, 61, is a native of Newport. He received his law degree from Chase Law School and entered private practice in 1951. Prior to assuming the circuit judgeship, Judge Dunn served as Covington police court prosecutor from 1956 until 1960, and police judge from 1960 until 1965. The judge is married and has two sons.

JUDGE BILLY RAY PAXTON

Completing the 1st Appellate District term of Roy N. Vance who was elected to the Supreme Court in November, Judge Billy Ray Paxton, 50, has served as circuit judge for the 45th Judicial Circuit (McLean and Muhlenberg Counties) since 1976. After serving in the Army during the Korean conflict, he received his undergraduate education and law degree from the University of Kentucky. He was a member of the Kentucky House of Representatives for four years (1970-1974) and served as Speaker Pro-Tem for two years until his resignation to become the commissioner of the Bureau of Highways and Secretary of the Department of Transportation from 1974-1975. The Muhlenberg county native is married and has four children.

JUDGE JOHN D. MILLER

John D. Miller completed the 2nd Appellate District vacancy created by the November election of William M. Gant to the Supreme Court. An Owensboro attorney since 1958, Judge Miller, 50, received his law degree from the University of Kentucky. He served as a member of the Kentucky House of Representatives during the 1966 session, and a member of the Owensboro City Commission in 1972. He is married to Shelia Ann Morton Miller.

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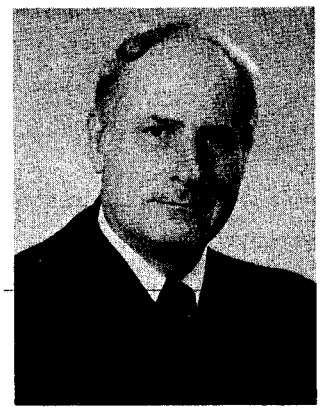
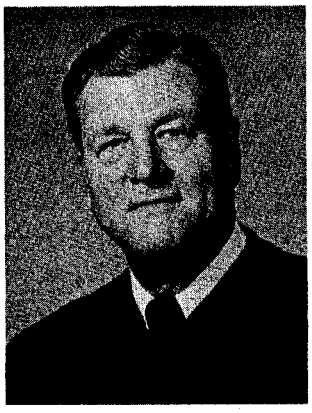
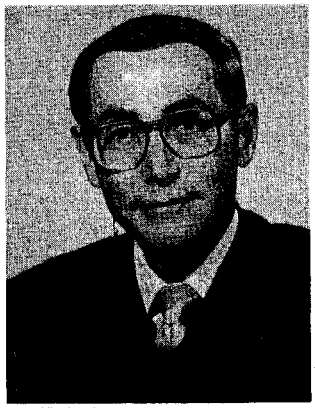
DONALD C. WINTERSHEIMER, ROY N. VANCE, CHARLES M. LEIBSON, WILLIAM M. GANT ELECTED TO THE KENTUCKY SUPREME COURT



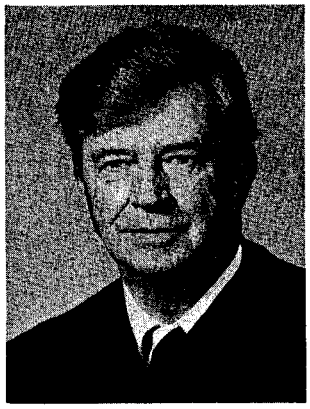
WINTERSHEIMER



VANCE



LEIBSON



GANT

DONALD C. WINTERSHEIMER
Justice, Supreme Court
Sixth Supreme Court District

Justice Wintersheimer was born in Covington in 1932. He received his A.B. from Thomas More College in 1953, his M.A. from Xavier University in 1957 and his J.D. from the University of Cincinnati in 1960. He engaged in private practice until he was elected to the Court of Appeals in 1976. In 1982, Justice Wintersheimer was elected to the Supreme Court.

ROY N. VANCE
Justice, Supreme Court
First Supreme Court District

Born in Paducah in 1921, Justice Vance received an associate degree from Paducah Junior College and his LL.B. from the University of Kentucky. He began practicing law in 1942, served one term as McCracken County Attorney and was Commonwealth's Attorney for four years from 1953 until 1957. In 1982, he was elected to the Supreme Court.

CHARLES M. LEIBSON
Justice, Supreme Court
Fourth Supreme Court District

Justice Leibson, 53, a cum laude graduate of the University of Louisville School of Law, practiced privately for 21 years, after serving in the U.S. Army as a legal officer. Justice Leibson served as circuit judge from 1976 until his 1982 election to the Supreme Court.

WILLIAM M. GANT
Justice, Supreme Court
Second Supreme Court District

Justice Gant was born in 1919 in Owensboro. He received an A.B. degree from Transylvania University in 1940 and his law degree in 1947 from the University of Kentucky. Past experience includes serving as a juvenile judge for eight years and commonwealth's attorney of the 6th Judicial District for over 14 years. He served on the Court of Appeals from 1976 until his 1982 election to the Supreme Court.

WEST'S REVIEW

The Kentucky Supreme Court closed out 1982 by rendering a significant number of published criminal law opinions in November and December.

In Evans and Thomas v. Commonwealth, Ky., 29 K.L.S. 13 at 3 (Nov. 2, 1982), the Court affirmed and expanded upon the decision of the Court of Appeals (29 K.L.S. 3 at 5) in this interlocutory appeal by the Commonwealth. The defendants, a Bell Co. physician and a Clay Co. dentist, had been indicted for Medicaid fraud in Franklin Co. The circuit court, holding that venue lay in both Franklin Co. and either Bell or Clay County, transferred the cases to the doctors' respective home counties. The Supreme Court agreed with the Court of Appeals that there simply was no authority for such a transfer. While KRS 452.550 provides that the prosecution of certain offenses may be brought in any one of several counties where acts constituting the offense occurred, the statute does not empower the trial court, after indictment, to transfer the prosecution to the other county. The Court found that the trial court's action amounted to a change of venue upon a ground and to counties of destination not authorized by KRS 452.210 et. seq. The court went on to discuss an issue not addressed by the Court of Appeals concerning Evans' attempt to appeal an interlocutory order denying his motion to dismiss the indictment because it made a felony out of a series of 54 misdemeanors. The Court held that although KRS 22A.020(4) authorizes the Commonwealth to appeal from an interlocutory order, there is no comparable provision for an appeal by the defendant. A petition for rehearing is pending in the Evans case.

In Tipton v. Commonwealth, Ky., 29 K.L.S. 13 at 4 (November 2, 1982), the Court reversed the defendant's first degree robbery and first degree persistent felony convictions because the prosecutor elicited testimony regarding a co-indictee's plea of guilty under the indictment and the potential sentence that plea carried. The Court rejected Tipton's argument that there was insufficient evidence to convict him of robbery where his accomplice had abandoned their effort to rob a grocery store before any theft was committed or attempted. The evidence showed that the two men had discussed robbing the store, obtained the necessary equipment and drove to the store where the accomplice went inside while Tipton waited in the car. The accomplice pointed a gun at the store's owner for a few seconds and then left without saying anything because he could not go through with it. The Court stated that the fact the Tipton's accomplice abandoned the effort tended to prove not that Tipton

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had also voluntarily renounced his criminal purpose, but rather had quit the scheme because of circumstances which made the accomplishment of the crime more difficult.

In Commonwealth v. Belcher, Ky., 29 K.L.S. 13 at 4 (Nov. 2, 1982), the Court reversed in part an unpublished opinion by the Court of Appeals. Belcher had been indicted and convicted of three counts of intimidating a witness. The evidence showed that the defendant had, in a single statement, threatened three witnesses, two of whom were not present when the threat was made. The Court of Appeals had held that Belcher's single act of threatening three witnesses constituted only one offense. The Supreme Court reversed this part of the Court of Appeals' decision and held that when crimes against a person are involved they are separate and distinct crimes when directed at separate and distinct persons. Thus, a single act of threatening three persons constitutes three separate criminal acts and may be joined in a single indictment.

In Gill v. Commonwealth, Ky., 29 K.L.S. 14 at 9 (Nov. 23, 1982), the defendant's trafficking conviction was upheld after the Court found oblique references possibly connecting the defendant with the unrelated offense of promoting prostitution to be harmless. The defendant's pro se appeal of his persistent felony conviction arose under rather unusual circumstances and was consolidated with his direct appeal.

After filing his direct appeal, the defendant filed and won a pro se RCr 11.42 motion challenging his first degree persistent felony conviction on the ground that only one of the two prior felony convictions could be used to enhance his sentence. The indictment was appropriately amended and Gill was then tried and convicted of being a second degree persistent felon. In his pro se appeal of this conviction, the Court rejected Gill's argument that he was placed twice in jeopardy when he was tried for being a second degree persistent felon after his earlier first degree persistent felon conviction was set aside upon a finding of insufficient evidence to support the jury's guilty verdict. A petition for rehearing is pending.

In Hopewell v. Commonwealth, Ky., 29 K.L.S. 14 at 10 (Nov. 23, 1982), the Court refused to review an issue concerning the trial court's exclusion of a statement by a co-defendant to the jailer that Hopewell was not culpable for the charged offenses. The Court found the issue unpreserved for appellate review because on appeal the defendant asserted grounds different than those raised in the trial court. Noting that the trial court has a broad discretion in determining whether a defendant has the ability to participate rationally in his defense, the Court rejected Hopewell's contention that he was denied due process by the boilerplate competency hearing.

In Reed v. Commonwealth, Ky., 29 K.L.S. 14 at 11 (Nov. 23, 1982), the Court affirmed an unpublished opinion by the

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Court of Appeals upholding Reed's conviction. Reed argued that because prospective jurors were not properly summoned, there was no properly constituted grand jury or petit jury and any action taken by either jury would be erroneous. The prospective jurors in Reed's case were served with a summons by first class mail. This method of service was not one of the methods authorized by KRS 29A.060(8) although it was permitted by the rules of administrative procedure. The Court found no showing of prejudice and held that the manner of service substantially complied with the statute. The Court called attention to an amendment of KRS 29A.060(8) which became effective October 1, 1982 and now permits the service of summons by first class mail.

In Luttrell v. Commonwealth, Ky., 29 K.L.S. 14 at 11 (Nov. 23, 1982), another case on review from the Court of Appeals, the Supreme Court held that the rigid presentment requirements of commercial law would not be imposed upon the theft by deception statute. The payee's failure to make a formal presentment of Luttrell's check to the bank was of no importance where the jury could presume from the $6,000 discrepancy in the amount of the check and the amount in the account that Luttrell knew at the time he delivered the check to the payee that it would not be honored. A petition for rehearing is pending.

In a certification of law in U.S.A. v. Cissell, Ky., 29 K.L.S. 15 at 7 (Dec. 14, 1982), the Court held that if a person accused of bribery of a public servant neither conferred any pecuniary benefit upon nor directed any communication to the public servant he has not violated KRS 521.020(1)(a). Thus, the statute is not violated by a person who is not himself a public servant when that person accepts money from another upon a promise to "pay off" a judge or influence a judge's actions, where the person accepting the money never has any direct or indirect contact with the judge concerning such payment.

In Gardner v. Commonwealth, Ky., 29 K.L.S. 15 at 7 (Dec. 14, 1982), the Court reversed the defendant's convictions due to the trial court's failure to comply with the provisions of KRS 504.040. A pre-trial motion had been filed to have Gardner examined to determine his mental condition and competency but apparently no direct action was taken on this motion. When the case was called for trial, Gardner was incoherent, unresponsive and disruptive. The trial court, on its own motion, called a doctor who worked part-time for Corrections and had briefly examined Gardner a week before trial. Based upon a half hour examination, the doctor concluded there was no evidence of a mental disorder but that Gardner had some previous drug problems and had an anti-social personality.

When asked if Gardner was competent, the doctor said she was unable to express an opinion because she only did court evaluations, not competency evaluations. The Court held that at this point the trial court, in order to pro-

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tect Gardner's due process rights, was compelled to obtain a current up-to-date professional opinion of Gardner's competency. If the report on Gardner's condition was unclear or contradictory, an evidentiary hearing should have been held to resolve any uncertainty.

In Brown v. Commonwealth, Ky., 29 K.L.S. 15 at 8 (Dec. 14, 1982), the Court reversed an unpublished opinion of the Court of Appeals and remanded the case to the trial court for entry of judgment of acquittal on the charge of theft by deception that arose as a result of an undercover operation investigating automobile transmission shops. The Court held that the crime of theft by deception requires, as an essential element, that the person whose property is taken actually be deceived by the perpetrator. Thus, in this case, where the undercover detective knew the condition of the car he took to the transmission shop and was never deceived into thinking the transmission needed the extensive repairs recommended and made by Brown, there was no theft by deception committed.

Finally, in Williams v. Commonwealth, Ky., 29 K.L.S. 16 at 13 (Dec. 28, 1982), the Court found no abuse of discretion in the denial of a defense motion for postponement so that the robbery victim's competency to testify could be looked into further after it was learned that he had recently been sent to Central State Hospital because there was a lunacy warrant against him. The Court found no error in the fact that Williams was impeached by three prior felony convictions obtained without representation by counsel where Williams had not alleged or proved that counsel had been requested and denied or that, without counsel, he was not intelligently, competently or voluntarily informed. The Court also held that once prior felony convictions are ruled admissible for impeachment purposes, the prosecution or the defense may introduce the nature of the prior offense. The Court found no prejudice in the prosecutor's closing argument request that the jury compare the evidence produced by Williams with that of the victim "who had no criminal record". The Court noted that in this case if the victim's credibility could have been attacked by showing he had a criminal record, it would have been and the failure to so attack the victim's credibility created a presumption that such testimony, if provided, would be unfavorable to Williams. Williams attempted to challenge his conviction as a persistent felon on the ground that he was not represented by counsel on either of the two prior felony convictions. The Court held that since Williams did not testify that he requested counsel and was refused, he did not establish any denial of his right to counsel. The Court also rejected Williams' argument that an instruction on jury nullification was required in the PFO phase.

The Court of Appeals also rendered a significant number of opinions during the last two months of 1982. In Taylor v. Commonwealth, Ky. App., 29

(Continued, P. 9)

K.L.S. 14 at 1 (Nov. 5, 1982), the Court ordered published an opinion rendered earlier in a pro se RCr 11.42 appeal. The Court found Taylor's pro se motion, filed after consultation with "lay inmate counsel", to be founded on lies and devoid of merit. The Court, noting that Taylor alleged facts in support of his motion and then under oath either admitted their falsity or refused to answer questions when confronted with prior inconsistent statements, expressed its hope that Taylor and his lay counsel would be investigated for possible indictment for perjury.

In Carter v. Commonwealth, Ky. App., 29 K.L.S. 14 at 4 (Nov. 12, 1982), the Court reversed and remanded the trial court's denial of Carter's CR 60.02 motion challenging two guilty pleas because of the judge's failure to disqualify himself under KRS 26A.015(2)(a)(b). The trial judge had been an assistant prosecutor at the time the indictments were issued and thus had a conflict of interest. The Court rejected the Commonwealth's argument that a trial judge need not disqualify himself if his ruling involves a question of law rather than a matter of discretion.

In Pedigo v. Commonwealth, Ky. App., 29 K.L.S. 14 at 5 (Nov. 12, 1982), the Court consolidated two appeals by Pedigo and affirmed his convictions. In the first appeal, the Court found a 21 month delay in imposition of sentence after pleading guilty not to be oppressive, purposeful or prejudicial so as to entitle Pedigo to relief under RCr 11.02 (1). In the second appeal, the Court found no error in the trial court's permitting Pedigo to confer with his counsel for only one hour before the third trial on the charges in question. The Court also found no prejudice in an over-abundance of uniformed police officers in the courtroom during Pedigo's trial in view of his prior conviction of escape and fifteen to twenty other felonies. The Court rejected Pedigo's contention that he was prejudiced by the introduction of an unattested copy of the bail bond in a bail jumping prosecution. Lastly, the court held that in persistent felony prosecutions, prior convictions from which a defendant had been conditionally discharged rather than probated would qualify under KRS 532.080(3)(c) since the only difference between probation and conditional discharge is whether the defendant is released with or without supervision. A discretionary review motion has been filed in the case.

In Turner v. Commonwealth, Ky. App., 29 K.L.S. 16 at 3 (Dec. 17, 1982), the Court affirmed an RCr 11.42 appeal by holding that Turner's guilty plea to being a first degree persistent felon was not involuntary due to the trial court's failure to inform Turner of the ten year mandatory service of sentence before eligibility for parole.

In Adkins v. Commonwealth, Ky. App., 29 K.L.S. 16 at 4 (Dec. 17, 1982), the Court held that the Commonwealth was not required to abide by the terms of a plea bargain that was

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never personally accepted by the defendant. Until such acceptance occurs, an offer is revocable by the Commonwealth. The Court ruled that a photographic line-up was not made impermissibly suggestive merely because the individuals in the photographs did not closely resemble each other. Such suggestiveness occurs only when elements in the photographs mislead witnesses in making their identification. The Court found no undue prejudice in a detective's spontaneous, inadvertent reference to Adkins' theft charge as a robbery. The Court also found no error in the trial court's refusal to instruct the jury that it could disregard conclusively established proof of prior convictions in the PFO phase and leave the punishment unenhanced. The Court stated that a jury could disbelieve evidence of prior convictions, but once persuaded that the defendant was convicted of two or more previous felonies, the jury must fix a sentence within the range specified in the PFO statute. Finally, the Court held that the fact that Adkins had been continuously in prison or on probation or parole since 1969 did not entitle him to have his convictions treated as a single conviction under KRS 532.080(4). The Court found that Adkins' sentences ran consecutively only because he persisted in committing new crimes before completing service of earlier sentences. The concurrent/ consecutive break applies only to defendants who commited more than one offense but received their sentences for all those offenses before serving time in prison on part of the offenses. In Harris v. Commonwealth, Ky. App., 29 K.L.S. 16 at 6 (Dec. 24, 1982), the Court rejected Harris' contention that his 1975 and 1977 convictions should have been treated as only one prior conviction under the PFO statute. Harris received a five year probated sentence on his 1975 conviction and his probation was never revoked. The Court held that Harris' sentences on his 1975 conviction and his subsequent 1977 conviction were not served concurrently and could not be considered uninterrupted consecutive terms within the meaning of KRS 532.080(4).

In a civil case of general interest, Elkin v. Department of Transportation, Ky.App., 29 K.L.S. 16 at 8 (Dec. 31, 1982), the Court held that a motorist arrested for driving under the influence of intoxicants has no right to consult with counsel prior to deciding whether to submit to a breathalyzer test.

In Commonwealth v. Karnes, Ky. App., 29 K.L.S. 16 at 10 (Dec. 31, 1982), the Court ordered published an opinion rendered earlier affirming the trial court's dismissal of the indictment against Karnes on double jeopardy grounds where the indictment was returned after the district court had assumed jurisdiction. In this case, an indictment charging Karnes with second degree robbery, receiving stolen property and being a persistent felon was presented to the circuit court two hours after the district court had reduced the charges to a misdemeanor and entered a judgment of conviction. The Court held that until such time as an indict-

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ment is reported to the circuit judge in open court, the district court may exercise its jurisdiction and enter any order or judgment it deems appropriate.

In Commonwealth v. Barber, Ky. App., 29 K.L.S. 16 at 10 (Dec. 31, 1982), the Court certified the law with regard to whether the Commonwealth may be required to furnish the names of its expert witnesses prior to trial. The trial court had dismissed the case against Barber on the ground of insufficient evidence after it excluded the testimony of the Commonwealth's handwriting expert whose name had not been furnished to the defense prior to trial. The Court held that the criminal rules do not require the prosecution to provide the defense with a list of its witnesses and that if ordered to do so, the prosecution would be entitled to an order of prohibition. The Court noted, however, that it would have been within the trial court's discretion to dismiss the case for noncompliance with KRS 422.120 which requires a party to give notice of its intention to introduce handwriting samples.

Two opinions of note were issued by the U.S. Supreme Court during the period under review. Anderson v. Harless, 32 CrL 4063 (Nov. 1, 1982), underscores the importance of "federalizing" issues raised in state courts. The Court summarily reversed a grant of habeas relief due to petitioner's failure to have presented the "substance" of his federal constitutional claim to the state courts. The petitioner must provide the state courts with a fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim. It is not enough that all the facts necessary to support the federal claim were before the state courts or that a similar state-law claim was made.

In Wyrick v. Fields, 32 CrL 4099 (Nov. 29, 1982), the Court summarily reversed an 8th Circuit decision that held a defendant's waiver of counsel during a defense requested polygraph examination did not extend to unanticipated post-test questioning by the examiner. The 8th Circuit had relied on Edwards v. Arizona, 451 U.S. 477 (1981) and found the post-test questioning to be violative of Field's Fifth Amendment right to have counsel present. The Supreme Court, in reversing, stressed the "totality of the circumstances" including the fact that Fields initiated interrogation by requesting the polygraph exam and the fact that disconnecting the polygraph equipment effectuated no significant change in the character of the interrogation. The Court stated that the questioning of Fields after the polygraph examination would not have caused him to forget the rights of which he had been advised and which he understood immediately before the examination.

DONNA PROCTOR

* * * * * *

YOUNGBERG v. ROMEO
ANALYSIS AND COMMENTARY

On June 18, 1982, the U.S. Supreme Court held in Youngberg v. Romeo that involuntarily committed residents of state mental retardation institutions have a constitutional right to habilitation and training related to their personal safety and freedom from restraints.

The historic case began in 1976 as an action for damages and injunctive relief. Nicholas Romeo, a resident of Pennhurst State School and Hospital in Pennsylvania, filed suit against the institution's director and two supervisors, alleging that he had been injured on at least 63 occasions in a two-year period and that these officials violated his rights under the Eighth and Fourteenth Amendments by failing to institute procedures to prevent such injuries. After the suit was filed, Mr. Romeo was physically restrained for part of each day by order of a doctor. His legal services attorney filed an amended complaint in December 1977, adding a damage claim which sought compensation for the use of restraints and for failure to provide Mr. Romeo with appropriate "treatment or programs" related to his mental retardation.

Following an eight-day trial, the federal district court instructed the jury that they could find that Mr. Romeo's Eighth and Fourteenth Amendment rights had been violated if the defendants had denied Mr. Romeo treatment as punishment for filing suit or had been "deliberately indifferent" to his serious medical and psychological needs. The jury returned a verdict for the defendants.

The Court of Appeals for the Third Circuit reversed and remanded the case for a new trial, holding that the liberty interest protected by the Fourteenth Amendment provided the proper constitutional basis for the rights asserted by Mr. Romeo, rather than the Eighth Amendment, which prohibits cruel and unusual punishment of persons convicted of crimes.

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The appellate court found, inter alia, that involuntarily committed people retain fundamental liberty interests which can be limited only by an "overriding non-punitive" state interest, that the failure to provide for Mr. Romeo's safety must be justified by a showing of "substantial necessity," and that the use of physical restraints raises a "presumption of a punitive sanction" which can be justified only by "compelling necessity."

Writing for the Supreme Court, Justice Powell agreed with the Third Circuit that Mr. Romeo had rights under the Constitution to personal security and freedom from bodily restraints.

The Court then addressed the "more troubling" issue whether Mr. Romeo had a constitutional right to minimally adequate habilitation. While a state "is under no constitutional duty to provide substantive services," nevertheless, the opinion continued, it has a duty to provide certain services and care to a person who is institutionalized and thus wholly dependent on it. Mr. Romeo asserted a right to minimally adequate habilitation training -- a service related to his primary needs and to his constitutionally protected liberty interest in safety and freedom from restraint. The Court held that the provision of such services is a constitutional imperative to the extent necessary to fulfill his rights to safety and freedom from restraints. It declined to decide whether a general right to habilitation for institutionalized residents exists. Chief Justice Berger concurred in the judgment but disagreed with the notion that Mr. Romeo has any constitutional right to training.

Turning to the scope of such a substantive right and the standards against which alleged infringements should be tested, Justice Powell wrote that Mr. Romeo's rights must be balanced against relevant state interests. In determining what standards lower courts must use to effect that balance, the Court rejected the standards proposed by the litigants. The state had advocated that its conduct should be judged only by whether it showed "deliberate indifference" to the plaintiff's needs. Mr. Romeo had argued that the state was obligated to provide treatment that would ensure a resident's safety or freedom from restraint, unless there was a "compelling" or "substantial" justification not to do so. The Supreme Court chose an alternative, emphasizing the "presumptively valid" judgment of professionals. It held that liability may be imposed only when a decision is "such a substantial departure from accepted professional judgment...as to demonstrate that the person responsible actually did not base the decision on such a judgment." Finally, professionals will not be individually liable if they were unable to satisfy normal

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professional standards because of budgetary constraints.

Declaring that the state must provide Mr. Romeo with training that "an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function free from bodily restraints," the Court remanded the case for further proceedings consistent with its decision.

COMMENTARY

The Romeo decision is a landmark in the evolution of the right-to-treatment movement. Although courts across the country have imposed treatment and habilitation requirements on state-operated institutions ever since the Alabama district court's historic 1972 ruling Wyatt v. Stickney, the Supreme Court had never addressed directly the question whether treatment and habilitation are constitutional imperatives.

The Court has now spoken by establishing, at least, a constitutional right to "minimally adequate or reasonable training" to vindicate the two basic liberty interests of safety and freedom from undue restraints. While explicitly not addressing the broader issue whether such residents have a right to the kind of services that will enable them to acquire and maintain the skills to cope as effectively as their capabilities permit or to enable them to leave the institution, the decision does offer a new tool for advocates representing institutionalized mentally disabled people.

Romeo will not, however, produce a rash of damage actions on behalf of such residents. The second key element in the decision is the standard of liability for violation of the right to safety and to be free from restraints. In choosing the standard of "substantial departure" from accepted professional judgment (higher than the standard applied in malpractice suits), the Court sought to reserve liability for a small class of cases. The practical result, in all likelihood, is that lawsuits against officials responsible for the operation of mental retardation facilities will

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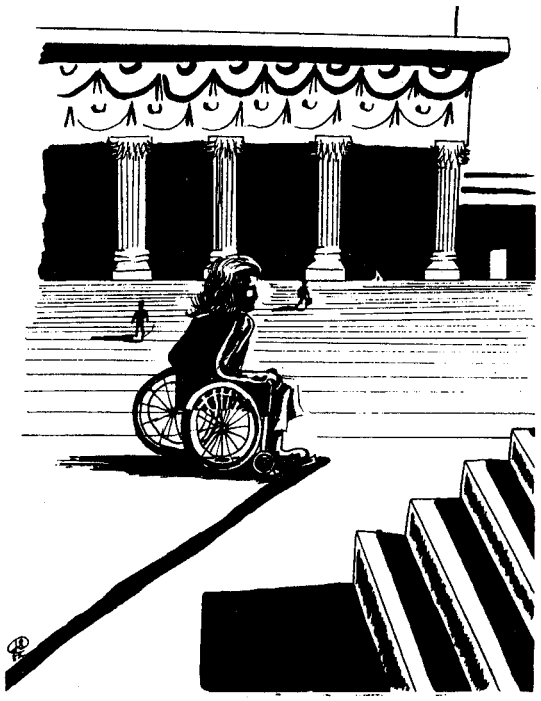

succeed only in very egregious cases. It will not be sufficient to assert that competing theories of habilitation and treatment should be resolved by the judge; the state will win if it can show that its acts are in accordance with any legitimate professional judgment. But Romeo does not tie judges' hands, either; relief will be available against institutions that abuse or ignore their involuntarily committed residents. The decision also leaves unanswered other questions referenced in the opinions and footnotes. For example, the majority opinion declined to consider whether institutional residents have a general constitutional right to training, even when the nature and amount of training would not lead to freedom. In a concurring opinion joined by Justices Brennan and O'Connor, Justice Blackmun expressed interest in considering whether states have an obligation to provide the habilitation or training necessary to avoid regression or deterioration of the skills an individual possessed when he entered the institution -- acknowledging, however, that the record in Romeo did not permit resolution of this issue.

Another major issue also remains unresolved: whether the individual's liberty interest is of such fundamental importance that the state is under an obligation to provide habilitation sufficient to give a person who has the potential to lie in the community the opportunity to realize that potential. The decision contains many cryptic suggestions concerning this critical question, but the majority of the Court does not appear to support this proposition.

While the scope of the rights established in Romeo remains ambiguous -- more precise definition must await the decision on remand or in related lawsuits -- we offer one suggestion about immediate application of the case to ongoing litigation. Romeo may enhance the possibilities for settlement of outstanding right - to - treatment/least - restrictive - alternative lawsuits. Following last year's Pennhurst decision, and particularly since the Court granted certiorari in Romeo, some state defendants have expressed understandable reluctance to engage in serious settlement negotiations. The pendulum had swung and it seemed merely a matter of time before the court would strike the fatal blow to the right to treatment. But that has not occurred and, as we enter this period of uncertainty about the parameters of the right, defendants may now wish to resolve outstanding cases which have long burdened their staffs and administrators.

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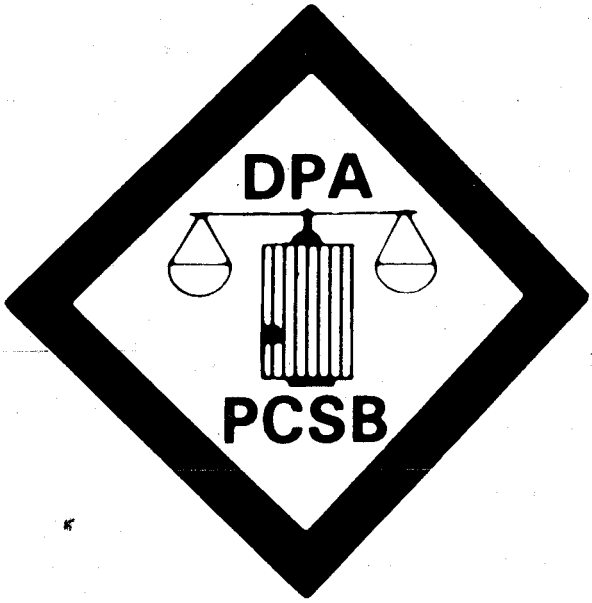

LIFE IN THE "FISH TANK"

Until the time of conviction you and your client are obviously concerned with preventing that outcome. However, once a conviction is received your client's attention will obviously shift to what will happen when he enters the correctional system. Surprisingly his future in the system may be largely determined by the first thirty days after he has been delivered to the custody of the Corrections Cabinet. It may also surprise you to learn that you have the opportunity to exert an influence on your client's direction.

After leaving the jail all male offenders are sent to the Kentucky State Reformatory. The Assessment/Classification (A/C) Center at KSR or "fish tank" as it is called by the residents of the institution is where all male offenders are received initially when committed to the custody of the Corrections Cabinet. An A/C Center for female offenders is located at the Kentucky Correctional Institution for Women in Pewee Valley. These centers have the responsibility of receiving, processing, evaluating and classifying all offenders with the exception of those under a sentence of death. Those offenders are sent directly to death row at the Kentucky State Penitentiary or to maximum security at KCIW.

For defendants entering the correctional system for the first time or reentering after having been out of the system for over twelve months the A/C Center provides a three to four week orientation and evaluation. During this period the resident is informed of the rules of the institution, regulations of the Corrections Cabinet, custody levels, available programs and penalties for offenses that may be committed while in the correctional system. But this program focuses primarily on determining where the resident should be placed within the system. In other words, your client's stay in the A/C Center will ultimately determine whether he receives maximum, medium or minimum custody and to which institution he will be assigned. This decision is based on a number of factors including safety considerations, statutory or regulatory prohibitions and the inmate's program needs. For example the Corrections Cabinet relying on KRS 197.140 forbids minimum custody for those residents who have been convicted of rape

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(1st, 2nd or 3rd degree), attempted rape, escape or attempted escape within the last five years, robbery first degree where another person was injured and assault first and second degree where the intent was to rob. Additionally, a resident with a life sentence must remain within the enclosure of an institution for a minimum of one year.

Also, the Corrections Cabinet forbids minimum security to those persons who have been convicted of the crime of sodomy unless they are within 180 days of their conditional release date or have made parole, inmates who have lost good time if that loss involves an act of violence or possession of contraband which may be considered dangerous to the security of the institution, inmates with detainers or pending charges from within the state for a Class A or Class B felony and inmates with detainers from other jurisdictions unless that jurisdiction gives documented approval.

Corrections will also consider the resident's vocation and location of his family. A farmer will most likely be placed in either the Roederer Farm Center or Western Kentucky Farm Center unless other considerations prevent this. Also, a resident will often be placed in an institution close to his family to encourage visits.

A second program is offered in the A/C Center for those residents who have been in the system within the last twelve months but have been returned for some reason such as a parole or shock probation violation, a transfer from another institution or after an escape or trip to court. This program is brief and is primarily concerned with ensuring that the resident is medically fit and informing the resident of any institutional rule changes since he was last in the system.

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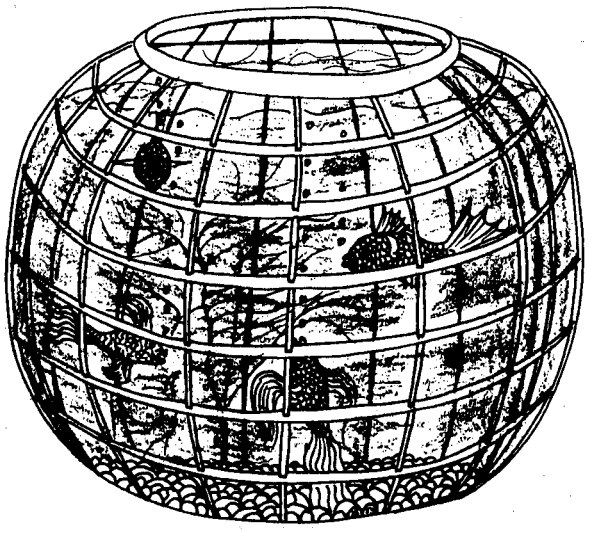

The primary function, however, of both centers is the development of a Progressive Incarceration Plan (PIP) for each resident and classification of each accordingly. The PIP is a classification tool that allows corrections officials to plan and monitor a resident's program direction, work assignments, trustee levels and institutional placements along a projected timetable for meeting those needs. The PIP is based upon a number of factors including risk potential, individual needs, and individual strengths and weaknesses. Information used for the PIP will come from the resident himself, the results of psychological and medical evaluations that are conducted for all new commitments, previous incarceration records, observations by the staff and the presentence investigation report.

The PIP is important to you as a defense attorney since information for the plan may also come from any reliable source. Indeed, Mr. Brad Black, Director of the Assessment/ Classification Center at the Kentucky State Reformatory, encourages defense attorneys to provide the center with any information that might be relevant to the purposes of the PIP. This can provide an unique opportunity for you to provide information concerning the treatment of your client. Through your relationship with the client you may have learned valuable information concerning his or her family. Although the resident is encouraged to participate in the PIP process, he may be unable or unwilling to provide this information to corrections officials.

Of particular importance is the presentence investigation report. We have found that the PSI has been used to make the important determination of the resident's level of custody. For instance, your client may have been involved in a first degree robbery in which another person was injured during the commission of the crime. Corrections' regulations will therefore prevent his classification to minimum security if the PSI indicates that someone was so injured. However, the PSI may not reflect that the injury was actually caused by a third party or that the injury was not the result of any overt act of the client. In this case although the presentence investigation report may be technically correct, it will be misleading to the officials in charge of classification and should be clarified.

After the orientation is completed the resident, with a minimum of forty-eight hours notice, will appear before an A/C Committee. The resident is encouraged to present a classification request and his goals for his stay in the correctional system to the committee in writing. After the hearing the committee, with the resident present, will determine the level of custody. At this point the resident's stay in the A/C Center will end.

RANDY WHEELER

* * * * * *

THE DEATH PENALTY

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THE DEATH PENALTY EXECUTION IN KENTUCKY: LOOK BACK AT SPEEDY JUSTICE

One of the dilemmas facing the State and inherent in the process of seeking the execution of a person convicted of murder is how long a delay there should be between conviction and any execution. Years ago, because counsel were not available and because the scope of federal habeas review was narrow, executions took place within weeks of affirmance by our Supreme Court (assuming any appeal at all). For example, in Williams v. Commonwealth, Ky., 206 S.W. 922, 923 (1947), the "young Negro... viciously... perverted... nature and violated the law of civilized man" by raping and murdering a white woman. "There was no defense offered in the trial and the attorneys representing the accused, under appointment of the court, do little more than submit the case that we may examine the record for error." Id. at 922. Luther Williams' case was tried in November, affirmed in December, 1947 and he was executed in February, 1948 [Department of Corrections records]. Jasper Neace was executed one month after rehearing was denied and his conviction and sentence affirmed on appeal, Neace v. Commonwealth, Ky., 211 S.W.2d 826 (1948); likewise, Raymond Ellison (despite two judges dissenting). Ellison v. Commonwealth, Ky., 225 S.W.2d 470 (1950). Jessie Lee Quarles' conviction was affirmed and rehearing denied February 29, 1952, despite the prosecutor's closing argument that the defendant was "a mean nigger." Quarles v. Commonwealth, Ky., 245 S.W.2d 947, 949 (1951). He was executed 35 days later.

THE DILEMMA

Supporters of the death penalty criticize delay in carrying out executions in strong terms. Indeed, during oral argument in Eddings v. Okalhoma, 102 S.Ct. 869 (1982), Mr. Justice Rehnquist criticized the "protracted litigation" in capital cases. 30 Cr.L. 4087 [The Advocate, Vol. 4, No. 1 at 11]. This echoed his comments in Coleman v. Georgia, 451 U.S. 949 (1981)(dissenting opinion from denial of certiorari), where he denounced "the increasing tendency to...delay the enforcement of [death penalty] statutes... [and] endlessly drawn out legal proceedings...[which make a] mockery of our criminal justice system." 68 L.Ed.2d at 338, 339. Proponents argue that delay "lessens the deterrent effect..." 68 L.Ed.2d at 339 [The Advocate, Vol. 3, No. 6 at 8].

On the other hand, shortening the time span between conviction and execution creates problems for even supporters of capital punishment. Justice Stevens' concurring opinion in Coleman reminds us: "We must...be as sure as possible that...shortcuts... [do not] permit error... . For after all, death cases are indeed different in kind from

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all other litigation. The penalty, once imposed, is irrevocable." 68 L.Ed.2d at 336.

The appropriateness of granting stays of execution until the condemned prisoner can exhaust full federal post-conviction review appears supported by the record of death cases in federal court since 1978. As reported by Mike Millman in Death Penalty Update (California State Public Defender, Dec. 15, 1982), the won-loss record in federal courts of appeal for capital defendants "has been an astounding 29 and 8... ." Most of these cases arose in the 5th and 11th Circuits--recognized for their non-interventionist approach to state court convictions on habeas review. It would appear then that the overwhelming majority of capital cases reaching the end of litigation still contain prejudicial constitutional flaws.

BROOKS EXECUTED WITHOUT FEDERAL HABEAS CIRCUIT REVIEW

On December 7, 1982, Charles Brooks was executed by lethal injection in Texas. The form of execution was a first. Brooks was also the first black executed since 1967. He litigated his case through federal district court where the judge denied relief but granted a certificate of probable cause (indicating there are appealable issues). However, a stay was denied. Despite stays having been granted in the first 70 death penalty cases to reach the federal circuit level since Gregg, the Fifth Circuit, after oral argument on the application, denied a stay. (Texas death row inmates had won the first 10 cases appealed to the Fifth Circuit). The Court issued two brief opinions "that did not dispose of the still pending appeal." Brooks v. Estelle, 32 Cr.L. 4131, 32 (December 6, 1982).

The U.S. Supreme Court also denied a stay but with no explanation. Justices Brennan, Marshall and Stevens dissented: "Our cases make it absolutely clear that where a certificate of probable cause from the denial of habeas relief has been issued, a court of appeals must consider and decide the merits of that appeal... . "[I]f there is probable cause to appeal it would be a mockery of federal justice to execute [petitioner] pending its consideration... .'" 32 Cr.L. 4131, 32.

In Brooks, a routine stay application suddenly became his last chance. By the time a more extensive application for stay was refiled, his life was almost over as the impetus for execution had gained too much momentum. Importantly, it does not appear that Brooks claims were frivolous. They included inter alia, an Adams v. Texas, 448 U.S. 38 (1980), issue and a claim of ineffective assistance of counsel as his lawyer presented no evidence in mitigation.

Even the prosecutor at Brooks' trial, Jack Strickland, filed an affidavit in support of the reapplication for a stay. It was never determined whether Brooks or his co-defendant, Woodrow Loudres, shot the victim. "It may well be the state of Texas executed the

(Continued, P. 21)

wrong man," Strickland said. Los Angeles Daily Journal (Dec. 8, 1982). Loudres also received the death penalty but won a new trial. The prosecution then agreed to a plea bargain and Loudres received a 40 year sentence. Proportionality arguments, based on Strickland's affidavit, were ignored.

BAREFOOT RECEIVES STAY

Does the Brooks' case mean a change in attitude on the part of federal courts towards review of habeas applications by death row inmates? Or does it simply mean that stay applications will receive stricter scrutiny in the future? We are about to find out. On January 25, 1983, another inmate from Texas, Thomas Barefoot, came very close to lethal injection. He was spared by a stay from the U.S. Supreme Court. The Court apparently intends to use Barefoot's case as a vehicle to decide how federal courts should handle stay applications in death cases. Arguments are set for April 26. It is unclear why the Court did not handle Brooks' case in such a manner.

INNOCENT BUT CONDEMNED?

"A 30-year old [Massachusetts] man who was sentenced to death and who spent 10 years in prison for a murder he says he did not commit was freed yesterday... . All charges against Lawyer Johnson... were dismissed based on new evidence from a witness to a 1971 murder who now says that Johnson was not the guilty man. The witness, who was 10 years old when the murder was committed, says the real killer was the man who testified against Johnson in two previous trials... [This man] is now serving a long sentence... for robbery and refuses to testify again. Without his testimony, the prosecution had no case." The Boston Globe (Oct. 20, 1982).

INNOCENT BUT CONDEMNED!

About a year ago another condemned inmate walked free. Johnny Ross, a 16 year old black, was convicted of raping a young white woman in Louisiana. He was sentenced to death in 1975 after a one day trial and after only a few minutes of deliberation. Ross wrote to the Southern Poverty Law Center begging them to help because "I didn't...have anything to do with it." SPLC came to Ross's aid. Indeed, their investigation proved he was innocent.

The proof was a simple blood test distinguishing Ross's blood type from the rapist's, which had been determined from a sample of seminal fluid taken from the rape scene--another case of mistaken cross-racial identification. Presented with this irrefutable proof, the prosecution, which had put Ross on Death Row, agreed to his release. On December 15, 1981, Johnny walked out of Angola Prison and into the arms of his mother. SPLC Legal Director John Carroll said: "Johnny's exoneration and release is an occasion for great happiness but it is also a time for sober reflection on the innocent men and women who have been executed in this country... ." Southern Poverty Law Center (January/February 1982).

KEVIN McNALLY

TRIAL TIPS

ETHICS: QUANDARIES & QUAGMIRES

BY: Vince Aprile

Query: May a defense attorney or a defense investigator in a criminal case properly decline to reveal to the prosecution, the police, or the courts the location of a non-client who is presently a fugitive from justice when the person's whereabouts is known to the defense solely through their own independent investigation?

In Kentucky the criminal law does not punish a person for his failure to volunteer, even upon request of law enforcement personnel, the location of another whom he knows is being sought in connection with the commission of a criminal offense. See KRS 520.120 & 520.130. To be guilty of hindering the prosecution or apprehension of another, a person must "with the intent to hinder the apprehension, prosecution, conviction or punishment of another...render assistance to such person." KRS 520.120(1); KRS 520.130(1). For the purpose of this offense, a person "renders assistance to another when he," inter alia, "harbors or conceals such person," KRS 520.110(1)(a). "[C]onduct such as merely refusing to answer police questions" or "refus[ing] to cooperate with investigatory personnel" is "not within the scope of" the statutory offense of hindering apprehension or prosecution. KRS 520.110 Commentary (1974).

According to the drafters of the Model Penal Code, the statutory language "harbors or conceals" states the traditional offense of harboring or concealing a fugitive. II ALI Model Penal Code and Commentaries (1980), Sec. 242.3, Comment, p. 223. "This language requires proof that the defendant acted to hide or secrete the other person or to lodge or care for him after secreting." Id.

Consequently, there exists no statutory duty or obligation on a defense attorney or investigator to provide law enforcement agents or prosecution representatives with the location of a non-client who is presently being sought in connection with the commission of a crime.

Of course, the absence of a statutory duty to reveal this type of information does not provide any protection to a defense attorney or investigator who is placed under oath in a judicial proceeding and asked to provide the whereabouts of the non-client fugitive.

(Continued, P. 23)

However, when the knowledge of the location of that fugitive is solely the result of the defense's independent investigation that information is privileged under the work-product doctrine.

Since the location of the witness was not in any way derived from information provided by the client, the attorney-client privilege would not be applicable as a means of preserving the confidentiality of this data.

The work-product doctrine, recognized initially in Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), protects from discovery materials prepared or collected by an attorney "in the course of preparation for possible litigation." Id., 67 S.Ct. at 391.

"Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital." United States v. Nobles, 422 U.S. 225, 95 S.Ct. 2160, 2170, 45 L.Ed.2d 141 (1975). "The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case." Id.

"At its core, the work product doctrine shelters the mental process of the attorney, providing a privileged area within which he can analyze and prepare his client's case." United States v. Nobles, supra, 95 S.Ct. at 2170. "But the doctrine is an intensely practical one, grounded in the realities of litigation in [this county's] adversary system." Id. "One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial." Id. "It is therefore necessary that the doctrine protect materials prepared by agents of the attorney as well as those prepared by the attorney himself." Id.

The work-product doctrine privilege is personal to the defense attorney. Only the defense attorney, not the client, can claim or waive work-product privilege. Lohman v. Superior Court of Alameda County, 81 Cal.App.3d 90, 146 Cal.Rptr. 171 (1978). "In other words, a counsel's work product is protected by a privilege that is subject to waiver by its holder." United States v. Salsedo, 607 F.2d 318, 320 (9th Cir. 1979).

The work product doctrine is clearly applicable to grand jury proceedings. In re Grand Jury Proceedings, 473 F.2d 840, 843 (8th Cir. 1973).

The case of In Re Terkeltoub, 256 F.Supp. 683 (S.D.N.Y. 1966), illustrates the function of the work product doctrine privilege in a comparable situation. In that case Fiorillo, Terkeltoub's client, had been indicted for committing perjury before a federal grand jury when he denied having had certain telephone conversations with

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Vone. After the indictment was returned, the federal prosecutor received information to the effect that Fiorillo and his attorney, Terkeltoub, had met with Vone and attempted to persuade Vone to testify at Fiorillo's pending perjury trial that he had not had the conversations alleged in the perjury indictment.

Subsequently, a federal grand jury attempted to ascertain whether the alleged meeting between Fiorillo, Terkeltoub and Vone warranted a prosecution for obstruction of justice. When the lawyer was called before the grand jury and asked questions concerning the alleged meeting and the attendant conversations, he refused to answer. The federal district court, upon the prosecution's application to compel testimony, held that Terkeltoub could not be compelled to disclose the requested information.

"[T]he work product doctrine formed the predominant basis for the Terkeltoub decision." In re Grand Jury Proceedings, 473 F.2d 840, 842 (8th Cir. 1973).

"[T]he disclosures...demanded [in Terkeltoub] touch a vital center in the administration of criminal justice, the lawyer's work in investigating and preparing the defense of a criminal charge." In Re Terkeltoub, supra at 684. In the circumstances of that case, the Terkeltoub court "conclude[d] that the attorney was not only entitled, but probably required, to withhold answers to the grand jury's questions." Id.

A request for the location of a fugitive witness is "a demand that is troublesome on its face -- a demand that a lawyer be forced to testify about his work in supposed defense of a client." In Re Terkeltoub, 256 F.Supp. 683, 685 (S.D.N.Y. 1966). Judicially, there is "a recognition that this sort of procedure must have at least a slightly chilling impact upon counsel for defendants in criminal cases." Id. at 685.

"It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and penalty in the event of conviction." I ABA Standards for Criminal Justice (2nd Ed. 1980), the Defense Function, Sec. 4.1. "The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." Id.

"Considerable ingenuity may be required to locate persons who observed the criminal act charged or who have information concerning it." I ABA Standards, supra, The Defense Function, Sec. 4-4.1, Commentary. "After they are located, their co-operation must be secured." Id. "It may be necessary to approach a witness several times to raise new questions stemming from facts learned from others." Id. "Neglect of any of these steps may preclude the presentaion of an effective defense." Id.

(Continued, P. 25)

"The effectiveness of advocacy is not to be measured solely by what the lawyer does at the trial; without careful preparation, the lawyer cannot fulfill the advocate's role." I ABA Standards, supra, The Defense Function, Sec. 4-4.1, Commentary. "Failure to make adequate pretrial investigation and preparation may be grounds for finding ineffective assistance of counsel." Id.

"At the heart of the job of 'thorough-going investigation and preparation' is the interviewing of prospective witnesses, hostile as well as friendly." In Re Terkeltoub, 256 F.Supp. 683 (S.D.N.Y. 1966). "And no lawyer, on any side of any case, would consider it salutary for his client that the opposition knew who was being interviewed and what was being said during such meetings." Id. "If vivid illustration were needed, it is supplied every day...by the Government's stout resistance to discovery efforts in criminal cases." Id.

The danger of revealing names of defense witnesses to the prosecution is apparent. "For example, if the defense witnesses identified are friends or relatives of an accused, the prosecution can anticipate an alibi defense; if police officers the defense of entrapment can be projected...investigation may reveal the details of the alibi or other defenses, or may yield other evidence useful to the prosecution including impeachment witnesses, inconsistent statements, and admissible evidence of specific instances of misconduct by the prospective witnesses." Allen v. Superior Court, 134 Cal.Rptr. 774, 557 P.2d 65, 68 n.4 (1976).

The defense's professional and constitutional obligations to conduct thorough investigations in every case may not be subverted by the prosecution into a vehicle for supplementing inadequate or incomplete government investigations. The government may not conduct a perfunctory investigation in a criminal case and then expect to raid the information acquired through defense inquiry to strengthen its case against the accused.

To open the defense files to ascertain the location of potential witnesses, regardless of the ostensible reason for the prosecutorial inquiry, would penalize the defense whose attorney was most vigilant in investigating the case and gathering all potentially relevant information.

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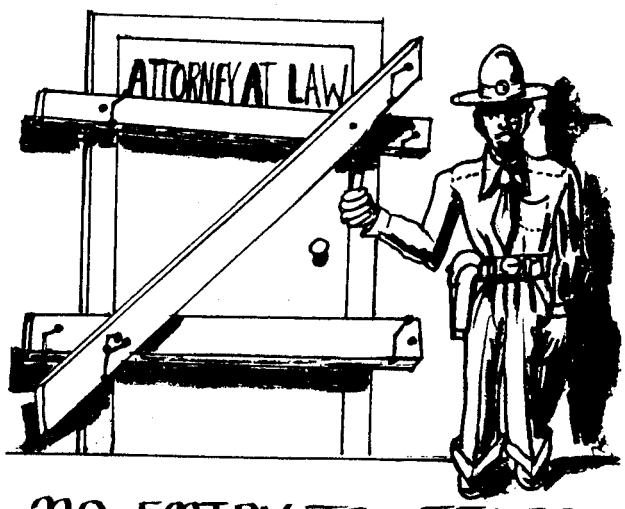


NO ENTRY TO FILES

"There are...vital public policy considerations which indicate that the need for protection of an attorney's work product 'outweigh[s] the public interest in the search for the truth.'" In re Grand Jury Proceedings, supra at 845, citing United States v. Bryan, 339 U.S. 323, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950).

"In our system a defense lawyer characteristically opposes the designated representatives of the State." Polk County v. Dodson, ___ U.S. ___, 102 S.Ct. 445, 450, 70 L.Ed.2d 509 (1981). The system "posits that a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing 'the individual interests of his client.'" Id., 102 S.Ct. at 450, citing Ferri v. Ackerman, 444 U.S. 193, 100 S.Ct. 402, 409, 62 L.Ed.2d 355 (1979).

Unlike discovery in a civil case, prosecutorial discovery is extremely limited. In Kentucky, "there is no authority for requiring a defendant to furnish [a] list [of defense witnesses] to the Commonwealth." King v. Venters, Ky., 596 S.W.2d 721 (1980). The Kentucky Supreme Court is "not entirely convinced that" such a requirement of disclosure "would be free of constitutional difficulty." Id.

If a defense attorney or investigator is placed under oath and asked to reveal information which he or she believes is privileged under the work-product doctrine, then the attorney or investigator should decline to answer in language comparable to the following statement:

> Upon review of the ethical and legal considerations that are binding upon a criminal defense [investigator] [attorney] and upon consultation with the general counsel of the Department of Public Advocacy as to the policies that govern the disclosure of information obtained in the course of a defense criminal investigation, I have reached the following conclusion:
>
> Due to the nature of the question, any answer would require me to reveal information pertaining to the scope and/or results of my investigation as a public defender [investigator] [attorney] in a particular case and would violate the work product doctrine privilege. Consequently, I must respectfully refuse [decline] to answer the question on the grounds that any answer to the question is privileged information under the work product doctrine.

It is important to remember that "[t]he fact that the work product doctrine [is] vigorously asserted creates no presumption that [the claimant] was engaged in any illegal activity." Id. at 843.

* * * * * *

BAIL AND BAIL HEARINGS

> But freedom was instilled into human nature by God. Hence freedom taken away from man always desires to return, as is always the case when natural liberty is denied.
>
> -FORTESCUE, John, De Laudibus Legum Angliae.

Counsel has as one of his first priorities securing the release on bond of his client. Traditionally, arrest takes place to insure attendance of the accused at trial. However, a defendant who is presumed innocent is entitled to guarantee his presence at trial other than through detention. Bail is nothing more than a defendant's secured promise to appear.

When Entitled To Bond

There is an absolute right to bail in all cases except when death is a possible punishment and "the proof is evident or the presumtion is great that the defendant is guilty" of the capital offense. RCr 4.02(1). This is enshrined in Section Sixteen of Kentucky's Constitution.

Compelling arguments exist to find that a state criminal defendant has federal constitutional protections for his bail. See Amsterdam, Trial Manual 3 for the Defense of Criminal Cases at Section 57-A (1978 The American Law Institute).

Type of Bond

The presumption in this state is that the appropriate bond is the release of the defendant on his own recognizance. A "defendant shall be released on his own recognizance or upon unsecured bail bond unless the court determines, in its discretion, that such release will not reasonably assure the appearance of the defendant as required." RCr 4.10.

The type of bail must be "the least onerous condition reasonably likely to insure [the defendant's] appearance at trial." Abraham v. Commonwealth, Ky.App., 565 S.W.2d 152, 158 (1977).

Criteria for Bail

The statutes and the rules of criminal procedure set out the principles for determining the proper amount of bail. KRS 431.525 lists six factors. It requires that the amount of bail shall be: 1) sufficient to insure compliance with conditions of release; 2) not oppressive; 3) commensurate with the nature of the charged offenses; 4) considerate of the accused's past criminal acts; 5) considerate of the defendant's reasonably anticipated conduct upon release; and 6) the financial abilities of the defendant. See also RCr 4.16.

Many other facts not specifically detailed in the statute and rule are inherently relevant to the determination of the amount of bail: 1) stability of accused's residence; 2) employment; 3) family contacts; 4) whether the defendant has always appeared while on any previous bonds; 5) did the accused attempt to avoid or resist arrest; 6) was

(Continued, P. 28)

he armed at arrest; 7) did he have any evidence of the offense in his possession; 8) what is the nature of the prosecution's evidence against him - circumstantial, scientific, eyewitnesses; 9) if multiple defendants, the degree of participation and culpability of the defendant; 10) the bond set for the codefendants; and 11) the mental status of the accused.

Information which has high relevance to the amount of bond is the evidence the prosecution has which indicates what the accused did and his level of participation.

For instance, if the only evidence available to connect the defendant to the crimes is the testimony of a codefendant who has received total immunity, it seems likely that this suspect evidence would require a lesser bail than evidence which comes from an unbiased witness. Defense counsel, in order to make the judge's determination of the amount of bail meaningful, must be allowed to explore this area of the evidence.

Likewise, the weight to be accorded the testimony of the witness is relevant to the bail determination. Defense counsel is therefore entitled to explore any bias of Commonwealth witnesses. See Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 39 L.Ed.2d 2347 (1974). This can be especially critical in a multiple defendant case when the only prosecution evidence is the testimony of an unindicted co-defendant with whom the prosecution has granted immunity.

At any rate, it is clear that, not only the nature of the offense, but also the nature of the accused's role in the offense is relevant to determine the amount of bail. White v. United States, 412 F.2d 145, 146 (D.C. Cir. 1968).

The Bail Hearing

A defendant is absolutely entitled to one adversary hearing to reduce the amount of the bail. RCr 4.40. A defendant must make the motion in writing, and can make it at any time prior to trial. RCr 4.40.

The proof at this hearing is restricted to that "which is competent under the ordinary rules of evidence." Young v. Russell, Ky., 332 S.W.2d 629, 622 (1960) (grand jury minutes are not competent evidence). Therefore, hearsay evidence is not admissable unless it is admissable under the ordinary rules of evidence.

This rule means that the Commonwealth cannot meet its burden of proof or rebut the defendant's proof with the hearsay testimony of the chief prosecuting officer. Rather, if they choose to rely on the testimony of one of their witnesses, they must produce the witness. Likewise, if the defendant needs to make his case by calling a witness, he is entitled to even if it is a prosecution witness.

In Kuhnle v. Kassulke, Ky., 489 S.W.2d 833 (1973) the defendant, at his hearing to reduce his bond, called the chief prosecuting witness, the

(Continued, P. 29)

assault victim. The trial judge refused to allow defense counsel to examine this witness because it would "constitute unauthorized discovery." Id. at 835. The appellate court held that a defendant is entitled to examine such a witness to prove his bail is excessive:

> It is the opinion of this court that appellant should have been permitted to examine the chief prosecuting witness at the hearing to reduce bail to the extent that the object of such an examination had any relevant bearing upon the factors which the court must consider under RCr 4.06 in determining the amount of bail. Id.

Even if hearsay were admissible, bail could not be denied based on hearsay evidence alone. Gladney v. District Court, 535 P.2d 190, 192 (Colo. 1975).

Findings and Conclusions

The record of the bail hearing must "demonstrate that the circuit judge did in fact exercise the discretion vested in him under the statutes and rules." Abraham, supra, at 158. The record must reflect this consideration and it must "contain a statement of the circuit judge's reasons for refusing to reduce bail." Id.

Capital Bail Hearings

The burden at a capital bail hearing to show that the proof is evident or the presumption is great that the defendant is guilty of the capital offense and will be sentenced to death is on the Commonwealth. RCr 4.02(3).

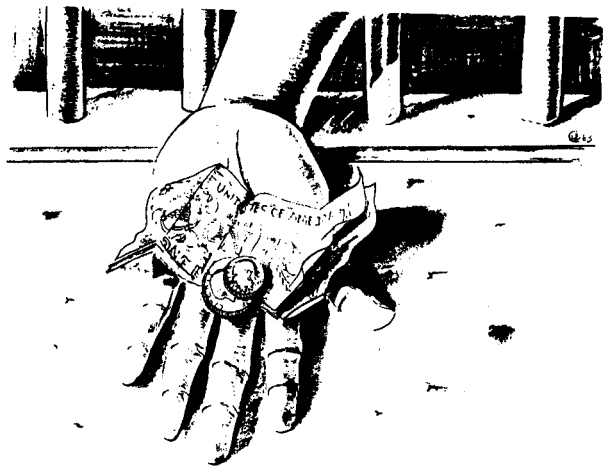
Since bail is circumscribed so narrowly, it follows that the bail hearing in a capital case must enjoy a wider scope than in an ordinary case.

The severity of the possible sentence in a death penalty case is axiomatically not reason enough to deny bail. White, supra, at 146-47.

Appeal

A circuit court defendant is entitled to appeal the judge's decision at the hearing to reduce bond to the Court of Appeals. RCr 4.43; Abraham v. Commonwealth, supra. The rule

(Continued, P. 30)



and case law provide an expedited procedure for challenging the trial judge's decision in the appellate court.

While this appeal does not automatically stay the proceedings below, a defendant may nevertheless apply for a stay to the appellate court.

According to RCr 4.43(2) the writ of habeas corpus, not an appeal, remains the proper procedure for circuit court review of a district court's action on bail.

Importance of Bail

The most important reason for bail is that it secures the freedom of a person presumed innocent. There are many important collateral benefits of bail. In fact, getting an accused out of the hands of the police is often vital to the defense. Release severely limits the authorities' ability to obtain inculpatory evidence or to obain evidence without defense supervision. Written and oral confessions and statements can often be the first and last nail in the coffin. Identification procedures and scientific testing are critical police actions. These procedures are more likely to be done fairly if the defendant is not in the exclusive control of the prosecution. Also, release allows a defendant to actively assist in his defense.

An important collateral benefit of bail hearings which involve prosecution witnesses is the look the defense obtains at the nature of the Commonwealth evidence. It will better allow the defendant to size up the case and make his plea and trial decisions.

ED MONAHAN

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The Journal of Correctional Education to be Edited/Published at EKU

The National Correctional Education Association has selected Eastern Kentucky University to edit and publish The Journal of Correctional Education. Dr. Bruce I. Wolford, Associate Professor of Correctional Services at Eastern Kentucky University will serve as Co-editor and Publisher of the quarterly Journal.

Dr. Wolford invites the submission of manuscripts focused at all aspects of correctional education (i.e. academic, vocational, post-secondary). Relevant submissions directed at other criminal justice topics are also encouraged. To obtain additional information, editorial policy, or to submit manuscripts contact:

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NO COMMENT

Chuck Sevilla edits a column called "Great Moments in Courtroom History" in the Forum, a publication of California Attorneys for Criminal Justice. It is often reprinted in Criminal Defense by NCCD. Needless to say, the "greatness" of the moments is a matter of some dispute. A similar piece, called "But Yer Honer!", appears in Voice for the Defense, the journal of the Texas Criminal Defense Lawyers Association. Lest you think Kentucky courtrooms lack such moments we have collected a few gems. We would like to make this a regular feature so let us know if you come across any scintillating repartee, profound pronouncements, legal palaver or the like. All quotes are guaranteed for authenticity.

GOD'S WORD

Testimony during the penalty phase of a capital trial. The witness is a minister testifying for the prosecution that the death penalty is a moral and ethical punishment even if the defendant was barely 15 at the time of the offense.

* * * *

"Q. Can you explain for me and the jury, please, in your opinion why the United Methodist Church, the Episcopalian Church, the Catholic Church and American Baptist Church, American Friends, Lutheran Church, National Council of Churches of Christ, Reform Church, United Churches of Christ, United Presbyterian Church, Unitarian Universal Society, American Ethical Union, and Union of American Hebrew Congregations, have condemned the death penalty?

A. The only conclusion I can come to in that case is they have all turned their backs on God's Word... ."

Epilogue - The defendant received the death penalty.

NO MERCY

The defendant filed a motion to reduce his bond because he was dying of cancer and was told by his doctor that he had one year to live. The Commonwealth's response to the bond reduction motion stated:

* * * *

"2. That the defendant has cancer, and that the defendant states that he is in need of medical treatment."

(Continued, P. 32)

"3. That defendant's illness has been diagnosed as terminal by his doctor, and there is a possibility that his life span will not exceed several more years."

"At this time with the knowledge that he is dying of cancer, it is the belief of the Commonwealth that this individual poses the most serious threat to our community because he has the knowledge that he no longer must pay for any of his transgressions against this society."

"WHEREFORE, the Commonwealth prays that this Honorable Court will continue the defendant's bond at its present amount."

Epilogue - Defendant died in jail awaiting trial.

KEVIN McNALLY & NEAL WALKER

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The Advocate is a bi-monthly publication of the Department of Public Advocacy and is co-edited by Karen Carney and Ernie Lewis. Thanks for this issue go to:

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As always, any articles, illustrations, suggestions, or comments you may have are welcome.

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